1972

# Ewell & Son, Inc. v. Salt Lake City Corporation, The Denver And Rio Grande Western Railroad Company, And Union Pacific Railroad Company : Petition For Rehearing By Appellant, The Denver And Rio Grande Western Railroad Company, And Brief In Support Thereof

# IN THE SUPREME COURT OF THE STATE OF UTAH



EWELL & SON, INC., a corporation,
*Plaintiff-Respondent,*

vs.

SALT LAKE CITY CORPORATION, a corporation,
*Defendant-Respondent,*

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
*Defendant-Appellant,*

UNION PACIFIC RAILROAD COMPANY, a corporation,
*Defendant-Appellant.*

Case No. 12166

## PETITION FOR REHEARING BY APPELLANT, The Denver and Rio Grande Western Railroad Company, AND BRIEF IN SUPPORT THEREOF

**Appeal by The Denver and Rio Grande Western Railroad Company, Defendant-Appellant, from a Judgment on Jury Verdict and Amended Judgment entered by the District Court of Salt Lake County, Utah, the Honorable Marcellus K. Snow, Judge Presiding, in Favor of Ewell & Son, Inc., a corporation, Plaintiff-Respondent.**

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Case No. 12166

## PETITION FOR REHEARING

The Denver and Rio Grande Western Railroad Company (herein "Rio Grande") petitions the Court for a rehearing in this cause upon the following grounds and for the following reasons:

1. The majority opinion as it relates to the critical issue in this case recognizes and restates the test for de-

termining whether there was an implied contract but overlooks the fact that the trial court erroneously instructed the jury as to the applicable test and hopelessly confused the issue with duplicitous, inconsistent and contradictory instructions.

2. The majority opinion condones the repeated admission of opinion evidence on the critical issue of whether there was an agreement—a radical departure from traditional concepts of admissibility and competence.

3. The majority opinion allows plaintiff a substantial recovery against Rio Grande for a delay assented to by plaintiff.

Respectfully submitted,

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# BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY IN SUPPORT OF ITS PETITION FOR REHEARING

## PRELIMINARY STATEMENT

At the heart of this case is the basic issue of whether there was an agreement, express or implied, for which plaintiff is entitled to recover certain compensation. Ewell claims compensation beyond a written agreement which he had with Rio Grande and he concedes that with respect to this claim Rio Grande did not expressly agree to pay him (R. 564). Thus the major part of the evidence, arguments of counsel, the instructions of the trial court and finally the decision of this Court dealt with the issue of proof of an implied contract. The split decision of the Court on the sufficiency of proof points up the significance and complexity of the fact issue. At the trial level it was crucial to a fair determination of the basic issue that the jury be properly instructed on the law. The majority opinion recognizes the basic test to be applied in determining the fact issue but as we shall point out, we believe the Court has overlooked the fact that the trial court erroneously instructed the jury with respect to this test and that the entire issue was hopelessly confused by a host of duplicitous, inconsistent and contradictory instructions.

The admission of opinions and conclusions of city employees as to whether there was an agreement, in light

of the posture of this case as it was submitted to the jury, constituted irreparable prejudice to the railroads, and we believe the majority opinion of the Court as it pertains to this issue is a radical departure from basic concepts of competence and admissibility.

Finally, we believe the majority opinion has overlooked the fact that Rio Grande has been charged a substantial sum of money for a delay which the plaintiff himself assented to by simply failing to proceed with the work while he was able and had every right to do so.

## ARGUMENT

### POINT I

### THE MAJORITY OPINION AS IT RELATES TO THE CRITICAL ISSUE IN THIS CASE RECOGNIZES AND RESTATES THE TEST FOR DETERMINING WHETHER THERE WAS AN IMPLIED CONTRACT BUT OVERLOOKS THE FACT THAT THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY AS TO THE APPLICABLE TEST AND HOPELESSLY CONFUSED THE ISSUE WITH DUPLICITOUS, INCONSISTENT AND CONTRADICTORY INSTRUCTIONS.

In its majority opinion this Court stated the test for determining whether there was an implied contract as follows:

". . . Even though the contract [between Ewell and the city] fixed the rights between the plaintiff and the City, there is no reason whatsoever why the plaintiff and the Railroads could not enter into collateral contracts concerning their responsibilities; and this could be either by express or implied agreement. The latter depends upon what was said and done between the parties. We have previously stated in the case of McCollum v. Clothier[2] the test to be applied is:

> . . . Under all the evidence, were the circumstances such that the plaintiff could reasonably assume he was to be paid *and that the defendant should have reasonably expected to pay for such services. . . .*" (Emphasis added)

The language employed by the majority opinion is a direct quote from *McCollum v. Clothier*, supra .It requires that the jury find (1) that the plaintiff could reasonably assume he was to be paid, *and* (2) that the defendant should have reasonably expected to pay.

In the Court's charge to the jury the jury was instructed: (Instruction No. 35, R. 132)

> "The law infers that one who requests or permits another to perform services for him promises to pay for such services. If you find from a preponderance of the evidence, that, under all of the circumstances, plaintiff could reasonably assume that it was to be paid for services, if any, rendered to either or both of the defendant railroads with their knowledge, then plaintiff is entitled to be paid the agreed price, if any price was agreed upon, or in any event, the reasonable value of said services.

> "*The test is whether a person in plaintiff's position could under all of the circumstances then existing, reasonably have assumed that it would be paid for services, if any, rendered.*" (Emphasis added)

This instruction was a verbatim copy of one of plaintiff's requests (R. 197). The broad and *unqualified* statement at the beginning of the instruction that the law infers a promise to pay from one who "permits another to perform services for him" is erroneous because it does not include the elements required by *McCollum v. Clothier*, supra. But the most patently erroneous and harmful part of the instruction is its failure in the statement of "the test" to include both elements. The Court in this charge eliminated the requirement that the jury find that "the defendant should have reasonably expected to pay." This was the only instruction purporting to tell the jury what the legal "test" was. It deprived defendants of their argument that they should not have reasonably expected to pay. (The facts of the case fairly permitted the argument that Ewell was only doing what he had already obligated himself to do and that he did not request or receive a promise to pay. This could have given considerable weight to the railroads position that they should not have reasonably expected to pay.) Each of the defendant railroads took due exception to Instruction 35. (See R. 929, 932).

To further compound and confuse the error in instructing the jury on the crucial issue of the case the trial court gave *twelve* instructions dealing directly with

legal principles relating to implied contracts. See Instructions No. 5 (R. 101), No. 7 (R. 103), No. 8 (R. 104), No. 9 (R. 105), No. 10 (R. 106), No. 17 (R. 113), No. 21 (R. 117), No. 22 (R. 118), No. 23 (R. 119), No. 35 (R. 132), No. 36 (R. 133) and No. 37 (R. 134). Though the issue of implied contract was the same as to both railroads four of these instructions purporting to state general principles of law related only to the defendant Union Pacific and not to Rio Grande. (See Instructions Nos. 5, 8, 9 and 10). Rio Grande excepted to the practice of the Court in confining its instructions on these principles to Union Pacific (See R. *930*). Plaintiff's counsel himself conceded the error in the procedure when he excepted to Instructions 5 and 8 for failure to apply the same principles to both railroads. (R. 924-925).

The duplicity, inconsistency and contradiction (i.e., compare Instruction No. 23 with Instruction No. 35) is apparent from a review of the twelve instructions on this relatively simple proposition of contract law. The reason for the error is also apparent. The trial court instead of giving a consolidated synthesis of the various requests gave almost every requested instruction *verbatim.* All of plaintiff's requests were given, only two of Union Pacific's fourteen requests were refused and only three of Rio Grande's sixteen requests were refused. See R. 155-200. (Note that the Court indicated refusal of Rio Grande's Request No. 8 but gave the instruction as the Court's No. 20.) The Court charged the jury in this case with *52* separate instructions. We expect that unless this

practice is corrected by the Supreme Court (as on rehearing in this case) it will continue in every jury case in at least one division of the Third District Court.

We do not challenge the law as stated in the main opinion relating to the "test" for the existence of an implied contract but we submit that the Court has overlooked the fact that the jury in this case was erroneously instructed by omission of an essential element of the test and had to be hopelessly confused by a multiplicity of duplicitous and inconsistent instructions.

## POINT II

## THE MAJORITY OPINION CONDONES THE REPEATED ADMISSION OF OPINION EVIDENCE ON THE CRITICAL ISSUE OF WHETHER THERE WAS AN AGREEMENT —A RADICAL DEPARTURE FROM TRADITIONAL CONCEPTS OF ADMISSIBILITY AND COMPETENCE.

With the focus of the entire case on "whether there was an agreement" between Ewell and the railroads, Ewell called in a group of "observers" to the conversation at the critical meeting of October 22. Not a single one of these persons could testify specifically that representatives of the railroads had made any specific express statement which might constitute an acceptance but over vigorous objection each was allowed to state his own conclusion or opinion of the ultimate fact. Harold S. Carter

testified "It was my understanding that the railroads accepted it" (R. 919-920), Joseph F. Fenton said "My understanding was that this was agreed upon" (R. 367) and William D. Keyting testified "It was my opinion that they had come to some agreement" (R. 428). Later the Court received a self-serving letter from Carter (Exhibit 14) that contained the same conclusion that there was an accord. Under the circumstances of this case, one cannot underestimate the effect of this testimony on the jury's determination of the ultimate issue.

The majority opinion in referring to this testimony concedes that it "admittedly presents a borderline question." *Joseph v. W. H. Groves LDS Hospital*, 7 Utah 2d 39, 318 P2d 330, dealing with the discretion of the trial court in permitting the opinion of an *expert* in matters *"beyond the knowledge possessed by laymen"* is the only authority cited by the majority opinion.

We submit that the endorsement by our Supreme Court of this evidence does "draw the shades" on Wigmore and Utah law as recognized in prior decisions. VII Wigmore Sections 1900, 1924; *Kimball Elevator v. Elevator Supplies Co.*, 2 Utah 2d 289, 272 P2d 583. In fairness the Court should not whitewash its prejudicial effect. Unless amended, the main opinion shall be quoted in the future as precedent for the proposition that the trial court has wide discretion to permit this type of lay opinion testimony on the ultimate issue. The Court should eliminate this erroneous and dangerous precedent on rehearing in this case.

## POINT III

## THE MAJORITY OPINION ALLOWS PLAINTIFF A SUBSTANTIAL RECOVERY AGAINST RIO GRANDE FOR A DELAY ASSENTED TO BY PLAINTIFF.

Ewell claims that he was delayed for two hours on November 8 and for nine hours on November 9 by Rio Grande's indecision as to how to proceed. He was allowed $2,341.35 for these eleven hours (R. 123, 205). He concedes, however, that he had a contract from Rio Grande on November 8 (R. 634, 636). He proceeded with the work on November 10 on the basis of the contract and without separate consent of Rio Grande. We believe the Appellate Court overlooked these uncontroverted facts. Viewing all of the evidence on this delay in light most favorable to Ewell it is still inescapable that if Ewell had a right to proceed on the 10th (which is not disputed) he had the same right on the 9th and as a matter of fact at any time after the contract was signed. This delay, if any, was a direct result of his own assent or acquiescence regardless of what Rio Grande told him or asked him to do. A recovery for delay under these circumstances is contrary to law and basic concepts of fairness.

## CONCLUSION

Rio Grande respectfully submits that a rehearing should be granted and that upon rehearing this cause

should be remanded with instructions to dismiss or in the alternative to strike the claim for delay and grant a new trial on the other issues of the case. A new opinion in this case will accord the defendants a fair trial under proper instructions dealing with the key issue in the case; will hopefully correct an undesirable practice in one or more of the divisions of the Third District Court and will eliminate what might well be a precedent to work injustice in some later case.

Respectfully submitted,

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